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Conclusion

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ABSTRACT

The chapters in this volume have sought to provide a better understanding of procedural fairness within the international system. Our aims here have been restrained given that the research agenda here is new; we have not sought to offer a 'universal model' of the concept but have rather sought to open a discourse with the more modest aim of identifying potential sub-principles that fit into the overarching conceptualisation of procedural fairness and exploring the degree of commonality of these principles amongst the various jurisdictions within the international judicial system. The aim of this concluding chapter is to provide a logical categorisation of these sub-principles, provide a possible framework given the findings that have been presented, and advance the key questions future research will have to grapple with given the current state of the research agenda. Of particular interest for future research are the problems for procedural reform of international courts and tribunals given the realities of cross-fertilisation, effectiveness and the utility of ad hoc reform versus grand revisions.

The chapters in this volume have sought to provide a better understanding of procedural fairness within the international system. The aims here have purposefully been restrained given that the research agenda is so new. As such, a 'universal model' of the concept has purposefully not been attempted, but instead a discourse has been launched with the more modest aim of

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exploring various sub-principles that may fit into an overarching conceptualisation of ‘procedural fairness’ and the degree of commonality of these principles amongst the various jurisdictions within the international system. To this end, Filippo Fontanelli and Paolo Busco caution scholars at the outset of this volume to use domestic systems as a touchstone in their analysis but, at the same time, not to fall into the trap of ignoring the domestic/international systems divide.

Loosely mapping procedural fairness as deriving from the substantive norms of equality, impartiality, and transparency, Fontanelli and Busco identify three key areas where an analysis of the international system must necessarily diverge from one concerning domestic systems: 1) sources of authority; 2) functions of procedural justice in an anarchic international system of decentralised institutions and actors; and 3) the dual role of States as parties and rule-makers in the international system. Fontanelli and Busco conclude their chapter with the observation that variation of procedural norms across international legal sub-regimes or institutions is an inevitable by-product of the unique international system. This last point emerges clearly as a common denominator in all of the research presented in this volume and a key theme that will be returned to in this concluding chapter.

As outlined in the introductory chapter by Sarvarian, the topicality of procedural fairness as a new (or, perhaps, renewed) area of research is demonstrated both by the increasing prominence of procedural problems in the practice of international courts and tribunals and by their increasing importance as actors in international dispute settlement. In the sketches of procedural fairness as manifested in various international courts and tribunals in this volume, it is evident that the topic is relevant not only to a single or several jurisdictions but rather across the international judicial system. Furthermore, while the issues that appear in their respective jurisprudence do diverge there is also a significant degree of commonality (e.g. evidentiary fairness).

The aim of this concluding chapter is to provide a logical categorisation of the sub-principles of procedural fairness identified in this volume, provide a possible framework given the variety of findings that have been presented, and advance the key questions that future research will have to grapple with given the current state of the research agenda. As will be discussed in detail, of particular interest are the problems for procedural reform of international courts and tribunals in light of the realities of cross-fertilisation, effectiveness and the utility of ad hoc reform versus grand revision.

### I. PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS: THE FINDINGS

In Part I of this volume (‘Procedural Fairness in National and International Traditions’), the authors engaged with the first area of analysis identified by Fontanelli and Busco, namely, sources of authority in the international system. The chapters in this section surveyed: the international system as a whole (Judge Sir Kenneth Keith) the common law tradition (Dr Sorabji) and the Romano-Germanic legal tradition (Dr Ruscalla). The aim here was to set the stage for a comparative examination of procedural fairness that looks to domestic judicial systems in its initial investigation of the concept and then attempts to extrapolate these principles to the international system proper.

In Part II of this volume (‘Identifying Core Standards of Procedural Fairness’) the authors explored the second area of analysis identified by Fontanelli and Busco — functions of procedural justice in an anarchic international system of decentralised institutions and actors. The chapters in this section focused their analysis on international courts and tribunals, looking at a mix of both criminal international jurisdictions and their non-criminal counterparts. The analysis in the chapters contained in this part sought to identify key principles that can then be tied back to procedural fairness as a concept.

A common thread that runs through all of the chapters in this section are the issues that can emerge when international courts with different jurisdictional and procedural systems operate within their statutory frameworks. Identification of common issues can impinge upon the ‘standardisation’ of procedural fairness sub-principles through cross-fertilisation. The rise of these issues is inevitable given the anarchic international system of international actors and institutions. It is these inherent problems and whether they have any solution that concern the final piece in this section (Dr Giorgetti).

A key conceptual puzzle that needs to be addressed is the heart of any analysis concerned with measuring how procedural fairness functions in individual international courts is exploring how the concept is viewed by these institutions. Echoing a theme that has emerged time and time again in this volume, there is no one universal view or definition of fairness as a concept but rather a multitude of practical issues, which nevertheless derive from certain shared principles, emerging from the distinct realities of different institutions. For
example, in international courts dealing with disputes other than criminal ones, fairness emerges as a concept conditioned primarily on the practical manifestation of consent to the procedure applied to the dispute at issue through, in part, attempting to ensure the equality of the production of evidence to match, while on the other hand one has a Romano–Germanic tradition focused on the oral presentation of evidence in an adversarial set of proceedings with naturally complex rules of

practical concerns naturally have given rise to fundamental questions: is it ever possible to ensure equality between the prosecution and defence when the prosecution is part of the machinery of the court itself? To what end is it even desirable or ‘fair’ to ensure such a balance when the alleged victims stand equally with the alleged perpetrators that harmed them? Is such a balance desirable and, if not, is the reverse situation in any way less troubling?

Are there any solutions to the web of conflicts that have been highlighted above in both international criminal and non-criminal adjudication? While not the only solution available, the seeming trend amongst international courts has been to begin to look to one another (rather than their domestic counterparts) in slowly creating a common set of procedural standards. To be sure, this approach is itself fraught with problems – as we have seen the institutions themselves are very different with different actors and end goals in mind – and yet this problematic solution may be the best available in the current anarchic international system. If this is to be accepted, then the utility of identifying a common set of transferrable sub-principles of procedural fairness becomes all the more important.

The volume ends out with Part III (‘Contemporary Procedural Challenges in International Courts and Tribunals’) in which the authors explored the third area of analysis identified by Fontanelli and Busco: the dual role of States as parties and rule-makers in the international system. The chapters in this section used a comparative approach to highlight the iterative notion of procedural fairness across different international legal institutions where State-actors serve as both interested parties and policy orientated rule-makers. What unites the chapters in this section is a notion that procedural fairness cannot be viewed as a universal set of values that travels across institutions but rather as an iterative set of norms that is both informed by the legal institutions it operates within and the actors involved in said institutions. Although there is a significant degree of overlap concerning the proce- dural challenges encountered by different institutions in their practice and even, to an extent, inspiration or cross-fertilisation from one court to another in engaging with those challenges, the overlap is nevertheless constrained by their differences both in terms of jurisdictional structures, normative regime and political constituencies.

For example, the concept of evidentiary fairness or integrity features in both WTO tribunals and in inter-State courts and tribunals. In WTO tribunals, the production of (documentary) evidence has been a significant
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evidence to match, while on the other hand one has a Romano–Germanic tradition based on the written presentation of evidence in a set of investigative proceedings that take place prior to the trial itself. These configurations naturally give rise to very different approaches over which parties have the responsibility to gather evidence (and the extent to which evidence needs to be shared amongst the parties), which parties are to give evidence at which stage of the proceedings, and the overall nature of the parties’ relationships with one another.

2 While not necessarily spelled out fully in the chapters in this section, these practical concerns within the international criminal tribunals can, arguably, be said to partly have their origins in the fact that the Common Law and Romano–Germanic legal traditions have very different institutional configurations which have, in turn, coloured the procedural norms that the two models have developed. On the one hand, one has a common law tradition focused on the oral presentation of evidence in an adversarial set of proceedings with naturally complex rules of
problem in its recent practice, this is less of a problem than was the case in previous decades in inter-State practice. Whereas WTO tribunals have relatively weak fact-finding powers at their disposal and have adopted alternative techniques to respond to the non-production of evidence – critically, reversal of the burden of proof – inter-State courts have, at least on paper, stronger fact-finding powers at their disposal that they have tended not to utilise. The permissive approach of the ICJ in not drawing adverse inferences or adopting a pro-active or 'inquisitorial' approach to fact-finding is arguably reflective of the cultural peculiarities of the laisser-faire tradition of inter-State arbitration with its more deferential attitude to parties due to the fact that they are States. Conversely, whilst the ICJ has generally carried this permissive approach into the field of expert evidence and has encountered difficulties in handling this evidence in its recent cases, World Trade Organization tribunals have adopted a more pro-active approach by appointing experts themselves with fewer problems arising in that area. Their willingness to intervene in the handling of experts in a transparent and direct manner is perhaps due to the fact that they are not of the deferential, quasi-diplomatic world of inter-State dispute settlement. Still in contrast, in human rights courts inquiries into matters of evidence and fact – while by no means trivial and giving rise to problems due to a relatively unsophisticated procedure for handling evidence – tend to be relatively rare.

Similarly, the equality of arms clearly lacks a uniform nature when manifested in inter-State, trade, human rights, investment and criminal courts and tribunals. In the criminal context, the traditional understanding is that it primarily serves to redress the imbalance between the prosecution (a government with greater resources at its disposal) and the defence (an individual) through legal aid and other mechanisms. Yet, this is complicated not only by the realities of international criminal adjudication, in which the ICC Office of the Prosecutor lacks many of the resources available to national counterparts (e.g. a police force) and some defendants (e.g. heads of State) are considerably more powerful vis-à-vis the prosecution than the system assumes. In non-criminal jurisdictions, the resource imbalances tend to centre on funding, legal expertise and experience. In the inter-State context, there is little apart from the (only partially-effective) trust funds available to redress these imbalances. Whilst the WTO is relatively more developed in the availability of legal aid mechanisms for inexperienced and/or poor litigants, human rights courts and investment tribunals lack any such machinery to ameliorate such imbalances. By extension, the admissibility of such imbalances in handling this evidence in its recent cases is a prominent issue in ICJ and ECtHR practice whereas in the ECtHR it is due to the stringent procedure recently enacted that rejects applications deemed to be filed incorrectly without appeal or reasons.

The impartiality, independence and competence of judges and arbitrators are also a point of cleavage amongst the respective jurisdictions, being very much dependent upon their particular architectures. Whereas the systems of nomination and election have come under increasing scrutiny in recent years in both criminal courts and tribunals (especially the ICC and human rights courts (notably the ECtHR) it has been less prominent on the procedural reform agenda – though by no means free from scholarly criticism – in inter-State, investment and trade courts and tribunals. Whilst presence of the individual in the criminal and human rights jurisdictions could explain this difference, the more persuasive explanation is that the agenda of each jurisdiction develops in line with the political expectations of their respective constituencies. Put simply, the degree of pressure applied from within and without the respective institutions determines when and to what degree reform of the systems of judicial nomination and election to improve the quality of judicial candidates is addressed. Moreover, the position of arbitrators (sensu lato) differs considerably from that of judges due to the greater degree of formal power parties have in controlling the procedure of the arbitration; yet, the approaches to this issue differ considerably in the inter-State and investment arbitration contexts.

These examples illustrate that the commonality of the sub-principles of procedural fairness identified in this volume is confined to, as it were, their existence as concepts forming part of judicial and arbitral procedure as a whole. They differ greatly however, in their manifestation and their prominence according to the particularities of each jurisdiction. This inhibits the scope of transferability from one court or tribunal to another in that the experience of the one must be interpreted in its context and then adapted to that of the other before use, which may not always be possible. While inhibiting the degree of cross-fertilisation, this caveat does not negate the commonality of the sub-principles as it demonstrates their importance as issues of concern to the respective institutions, and to be addressed by them in their own contexts while nevertheless drawing upon applicable experiences of their counterparts.

A. Sub-principles of Procedural Fairness

Fontanelli and Bueso caution the reader at the outset to view procedural fairness as something to be described rather than defined – this functionalist approach to the concept colours the chapters in this volume and allows for a distillation of basic sub-principles derived from practice at the international level rather than a catch-all definition deriving from grand theory. If this was the goal set at the outset of this volume, then the natural question which arises is whether it can be said to have been met. Figure 1 below attempts to set out a set of sub-principles of procedural fairness derived from the findings presented in the empirical chapters of this volume and attempts to extrapo-
As can be seen from Figure 1 above, the analysis provided by the empirical chapters of this volume can be distilled into specific sub-principles of procedural fairness derived from the substantive norms of equality, impartiality and transparency. Within the first cluster deriving from the norm of equality, we see sub-principles that can both complement and contradict one another. Judicial fora should be open to all parties and yet once within the forum the parties must be both equal in their opportunities to present their case yet also balanced with one another so that inherently deprived parties are not permanently disadvantaged. Slightly different is the second cluster deriving from the norm of impartiality where one sees sub-principles that better complement one another including due notice provided to the parties by the judicial forum in question and professional ethics and impartiality amongst counsel and adjudicator(s). Along these same lines, the third and final cluster deriving from the norm of transparency provides a set of sub-principles relating to due process/legality (actions deriving from set and specific rules and procedures) and evidentiary integrity (the transparent exchange of evidence between parties).

As Fontanelli and Busco explain, one of the key by-products of the uniquely anarchic international system is that procedural norms will tend to vary across legal sub-regimes or institutions. To take just one example, the equality of arms as a sub-principle of procedural fairness emerges with sometimes different characteristics, depending on the international legal institution applying it. What explains this variation across international legal sub-regimes? It is clearly not context-specific; nor is it necessarily connected to subject-matter jurisdiction – there is a wide variety in practice both across and within specific domains of international law.

### B. Legal Status of Procedural Fairness Sub-Principles

A key issue emerging from the identification of these various principles is their status in positive law, which carries implications both for the legislation of international law and for the rights and duties of parties and courts or tribunals. Although they are at times invoked by international courts and tribunals to justify procedural decisions and by commentators to criticise such decisions against a standard, these applications do not necessarily mean that each principle is a legal norm. For those principles that have an express or implied statutory basis (e.g. the equal treatment of parties and the impartiality of judges) their status is uncontroversial. However, for other principles that may lack such a textual basis (e.g. the right to review, professional ethics) their application as positive law must derive from the category of 'general principles of law' or from the doctrine of 'inherent powers' or 'inherent jurisdiction'.

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3 Art 38(1)(c), Statute of the International Court of Justice 1945.
As explored in Chester Brown’s work and explained by Fontanelli and Busco, the use of general principles of law to fill procedural lacunae in the statutes of international courts is well-established (e.g., on the burden of proof and the evaluation of evidence) yet rather poorly-developed in practice. The theoretical underpinning of this legislative technique is either a general principle of law commonly accepted in national legal systems (an example may be the equality of arms) and/or commonly accepted across the international judicial system (an example may be the equality of parties). Although this is relatively straightforward as a matter of legal principle, the comparative methodology of identifying the standards by which principles are manifested across quite divergent systems of law offers considerably more problems. It is not enough to declare that the principle is recognised in judicial systems in question, for the precise content of the principle must be that which is commonly accepted – a potentially more contentious matter.

The inherent powers doctrine, by contrast, can have blurred boundaries yet has also found currency in practice. Differing explanations for its character clearly distinguish it from implied powers, which rely on the criterion of necessity stemming from the overall scope and function of an institution. Explanations for the inherent power doctrine include natural law and a variation of the general principles doctrine: the essence of the concept is that a ‘court’ or ‘tribunal’, qua ‘court’ or ‘tribunal’, possesses certain powers that are indispensable to the nature of the judicial or arbitral process. Whilst this theory suffers from a certain circularity and has been subjected to criticism, in practice it has been applied as a gap-filling technique to justify judicial facts addressing problems to which their statutes offer no clear answers (e.g., on the exercise of competence-competence). Methodologically, it suffers from the weakness of relying upon precedents set in national or international judicial systems while lacking a sophisticated technique or an explanation of its own limitations.

The practical implication of this question of the status in positive law of the sub-principles of procedural fairness identified above is whether they can be invoked by parties before international courts and tribunals without an express or implied basis in statute. For example, may a party challenge a judge on the basis of professional competence; conversely, is a court or tribunal obliged to ensure that each judge is professionally competent to sit in the case? Can a party invoke evidentiary integrity to seek review of a decided case (rex judicata) where an allegation arises of evidentiary corruption? If these principles are capable of being invoked by parties, they must do so as positive rules of law; if there is no statutory basis, they are derived either from general principles of law or from the doctrine of inherent powers.


Alternatively, a principle can have the status not of a procedural right of parties and corresponding duty of courts but rather as a power of courts. Conceived as powers, procedural principles serve to justify the procedural discretion exercised by courts in their practices: for example, evidentiary integrity could underpin a decision to review a challenged judgment or award (subject to statute) while not obliging the court to do so. They remain complementary to the courts’ statutes as enabling judicial discretion rather than as constraining it.

This approach, of course, would not spare the courts and tribunals from criticism based upon principles of procedural fairness used as a benchmark for evaluation of their performance. For example, commentators could invoke the equality of arms to criticise architectural imbalances between parties, or judicial impartiality to attack the appointment of judges or arbitrators who are said to be biased. In this sense, the sub-principles of procedural fairness could be described as natural law: that is, as morals deriving from the collective experience of mankind developed over the centuries and rooted in theological and philosophical conceptions of justice. The significance of this status is as lex ferenda (‘future law’ or what the law should be) inspiring the progressive development of the positive law rather than as lex lata (‘positive law’) applicable in current practice, whether as rights/obligations or as powers.

Whilst this volume has not purported to offer conclusions as to the legal status of the sub-principles of procedural fairness identified as arising in the practice of international courts and tribunals, it does suggest that there is a need to regularise the treatment of these principles in practice. Since the implications of their status are potentially important not only to the procedural treatment and substantive outcomes of individual cases but also to the wider architectural development of both particular judicial and arbitral institutions and the wider international judicial system, further work on these concepts in scholarship and practice would serve not only to delimit clearly the bases for procedural challenges to decisions but also to lay benchmarks for the progressive development of the system. Are the principles to be treated as rules or norms of law that may be invoked in the procedural law of international courts and tribunals, independent of statute, or do they serve as moral standards or inspirational principles that inspire the progressive development of institutions?

A potential ‘middle way’, which appears to be the grey area which the procedural fairness principles primarily inhabit at present, is their utility to steer the interpretation of existing rules of procedure. On this approach, they do not accrete to the existing rules – they do not constitute law in themselves – but are rather interpretive guidelines for international courts and tribunals when confronting novel and/or difficult situations for which their statutory rules may be ambiguous, obscure or inadequate. In other words, principles
of procedural fairness are not justiciable as rights or duties by the parties as 
"general principles of law" in the absence of a textual foundation; rather, they 
can be cited to assist the international court or tribunal in the exercise of its 
powers.

In this respect, it is suggested that experience offers a bifurcated approach 
to the treatment of these principles. On the one hand, their authoritative 
ness within a particular jurisdiction depends on the statute of that 
court or tribunal — whether they will both displace any general principle and will 
define judicial or arbitral powers — and the degree of acceptance that they 
have garnered in national and/or international judicial practice as 'general 
principles of law'. In other words, to be given tangible form in the procedural 
law of a court or tribunal, the principle is either expressly or implicitly legis-
lated in its statute or is imported by that court or tribunal — either in its 
rules of procedure or in its procedural decisions in specific cases — as a 'gap-
filler' to resolve procedural problems omitted from its existing rules. On the 
other hand, the principles serve as ethereal norms of general application as 
benchmarks for the assessment of practice. In this sense, they cannot be 
invoked as procedural rights of parties or obligations of courts, yet can be 
used to evaluate the exercise of judicial power.

Although the identification of a body of general law of international procedure 
obliging international courts and tribunals to realise certain 'core' or 
'fundamental' procedural rights is a potentially valuable avenue of research, 
392 it is suggested that, in practice, the significance of these principles may be 
greater in their inspirational or 'moral' manifestation. It is understandable 
that judges and arbitrators are instinctively reluctant to restrict their discre-
mination. Moreover, the constriction of flexibility and discretion is not necessarily 
beneficial to the cutting of knotty Gordian problems in practice. However, 
the enactment of carefully-constructed procedural reforms — whether to the 
rules of procedure, in the form of procedural and administrative innovations, 
or in more wide-ranging architectural changes — can be beneficial to the work 
of the institution by providing long-term and general improvements 
detached from particular proceedings. If offered in a spirit of helpfulness and 
respect rather than in one of reproach or censure, it is arguably likelier that 
reforms offered by scholars and practitioners will be well-received by the 
courts in a spirit of dispassionate and constructive engagement as a valuable 
resource for institutional reform.

II. THE POWER OF INSTITUTIONS: FUTURE RESEARCH IN INTERNATIONAL 
PROCEDURAL LAW

At the time of writing, recent events have demonstrated the continued topi-
cality of the subject of this study. In the Arbitration between Croatia and 
Slovenia case, brokered by the European Commission, conducted under the 
auspices of the Permanent Court of Arbitration and concerning delimitation 
of the maritime and land boundary between the two States, the peaceful 
settlement of the dispute was thrown into sudden doubt in July 2015 by the 
allegation that the arbitrator of Slovenian nationality, Dr Jernej Sekolec, was 
secretly in contact with the Slovenian agent, Simona Drenik. This contact, 
which allegedly took place during two secret telephone conversations on 15 
November 2014 and 11 January 2015, included discussions of how to best 
influence the other arbitrators to rule in Slovenia's favour, the sharing of 
Slovenian submissions directly with Dr Sekolec (who stated that he would 
present them to the other arbitrators as his own 'notes' on the case), and the 
advance leaking of the deliberations of the Tribunal to Ms Drenik, including 
the tip that the Tribunal would award to Slovenia two thirds of the disputed 
waters it had claimed. If true, this raises questions concerning arbitral 
appointment, impartiality and independence, as well as the implementation 
of espionage by parties. 5 Difficulties concerning allegations of bias, conflicts 
of interest and disqualification have also arisen concerning the arbitrators in the 
ConocoPhillips v Venezuela ICSID arbitration. 6  

In this context, we suggest that the research agenda can focus on sharpening 
practitioners' and scholars' collective understanding of the following issues:

1. Identifying a set of logical and coherent sub-principles of procedural fair-
ness common to international courts and tribunals, as has been proposed 
above;
2. Determining the legal status of these principles in practice, whether as 
gap-fillers supplementing (as rights and obligations) the procedural texts 
of international courts and tribunals or as natural law principles inspiring 
and informing the exercise of judicial power;
3. Devising solutions to the problems encountered in practice through 
procedural reform.

These issues are clearly inter-related in that the answer to the one necessarily 
affects the answer to the others. Yet, they are distinct in that the methodologies 
necessary to answer them convincingly differ: the first question demands a 
primarily empirical approach, the second a predominately doctrinal one and

5 See our posts on the controversy — Sarvarian and Baker, 'Arbitration between Slovenia and 
6 ConocoPhillips Petronas ST and others v Bolivarian Republic of Venezuela (ICSID Case No. 
ARB/07/00), Decision on the Proposal to Disqualify a Majority of the Tribunal (1 July 2015) 
the third a mainly normative one. In addition, the questions are sequential in that they build upon one another towards the overarching goal of achieving practical outcomes that reflect ever-better procedures in the international judicial system. Through the continuous pursuit of improvement international courts and tribunals can increase their power in international relations through the perfection of the art of judicial technique. In this way the attractiveness of pacific international dispute settlement can be promoted and the contribution of international law towards a world without war can be realised.